No. 85-1844

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

F. D.,

Petitioner,

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC. AND
JOHN DOE AND JANE ROE,

Respondents.

Petition For A Writ Of Certiorari
To The Court Of Appeal,
Fourth Circuit, State of Louisiana
And Motion To Vacate The Judgment Below

PETITION FOR WRIT OF CERTIORARI

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F. D.

QUESTIONS PRESENTED

I

Whether the State in enacting Louisiana Revised Statute 9:401, 9:402 and 9:404 and 9:422.3-422.10 impermissibly discriminated (and violated the Equal Protection Clause of the Fourteenth Amendment) against that class of parents who contemplate surrender of their children for adoption, for the statutes governing agency adoption do not allow for any rescission of the surrender, whereas the statutes governing private adoption (Louisiana Revised Statutes 9:422.3-422.10) do allow for a 30-day period in which to rescind surrender, and as well mandate that the surrendering parent have legal counsel present at the act of surrender.

II

Whether Louisiana Revised Statutes 9:401, 9:402 and 9:404 (pertaining to agency adoption proceedings) in not providing a parent any period of time in which to rescind the surrender of his or her child to an adoption agency, and in terminating at the time of the surrender all rights of the parent to appear and object to any adoption proceedings or to appear at any other proceedings involving the welfare and placement of the child, or to even be notified of said proceedings, deny the petitioner due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the U. S. Constitution and by the Constitution of the State of Louisiana.

PARTIES

F. D. is a person of the full age of majority and domiciled in the Parish of Orleans, State of Louisiana.

Associated Catholic Charities of New Orleans, Inc. is a non-profit corporation licensed by the State of Louisiana as an adoption agency and having its principal place of operation in the Parish of Orleans, State of Louisiana.

John Doe and Jane Roe, upon information and belief, are two married individuals, both of the age of majority and residing in the greater metropolitan New Orleans area, State of Louisiana.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

F. D.,

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ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC. AND
JOHN DOE AND JANE ROE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA AND MOTION TO VACATE THE JUDGMENT BELOW

The petitioner, F. D. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, entered in this proceeding on December 11, 1985 and moves this Honorable Court to vacate that judgment.

OPINION BELOW

The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, appears in the Appendix hereto. The judgment of the Civil District Court for the Parish of Orleans also appears in the Appendix together with the writ denial by the Supreme Court of Louisiana.

JURISDICTION

The judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, was rendered on December 11, 1985. A Petition for Writ of Certiorari was timely filed with the Supreme Court of Louisiana, but writs were denied on February 7, 1986. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3). The federal questions of petitioner's due process and equal protection rights being violated were raised at the trial level proceedings in the Civil District Court for the Parish of Orleans, as well as in the Court of Appeal, Fourth Circuit, State of Louisiana and the Supreme Court of Louisiana proceedings.

STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION. Amendment V.

> No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION. Amendment XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA CONSTITUTION, ARTICLE 1

SECTION 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolated by the state.

SECTION 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and

involuntary servitude are prohibited, except in the latter case as punishment for crime.

LOUISIANA REVISED STATUTES 9:401-402, 404

§401. Definitions

As used in this Part:

(1) "Agency" means the state department of public welfare or an agency or institution licensed by the state department of public welfare for the placement of children for adoption.

(2) "Child" means a child under seventeen years of age.

(3) The singular includes the plural, the plural the singular, and the masculine the feminine, when consistent with the intent of this Part.

§402. Voluntary surrender of custody of child; procedure

Any parent of a child, whether the child was born in wedlock or out of wedlock and whether the parent is over or under twenty-one years of age, may surrender the permanent custody of his child to an agency for the purpose of having the child adopted by appearing before a notary and two witnesses and declaring that all of his rights, authority, and obligations, except those pertaining to property, are transferred to the agency. This authentic act shall be signed by the agency and shall constitute a transfer of custody to the agency after which the agency shall act in lieu of the

parent in subsequent adoption proceedings. No surrender of the custody of a child shall be valid unless it is executed according to the provisions of this Part.

§404. Effect of voluntary surrender or decree of abandonment of child

A surrender by the mother of a child born out of wedlock who has not been formally acknowledged or legitimated by the father terminates all parental rights except those pertaining to property. The same shall be true as to a court order of abandonment. However, no surrender or court order of abandonment as to only one living parent of a legitimate child shall be binding upon the other living parent.

LOUISIANA REVISED STATUTES 9:422.3-422.10

§422.3. Voluntary surrender of custody of child for private adoption

The parent or parents of a child, whether the child is born in wedlock or out of wedlock and whether the parent is over or under eighteen years of age, may execute an authentic act of voluntary surrender of custody of the child for private adoption. The formal act shall be evidence of a legal and voluntary surrender only if it is executed in accordance with the provisions of this Subpart. The provisions of this Subpart shall be inapplicable where custody of the child has been removed by court order and placed with the Department of

Health and Human Resources and the parent or parents shall have no capacity to execute an authentic act of voluntary surrender of custody as provided for in this Subpart. Nothing in this Subpart, however, shall alter the provisions for or the effects of a voluntary surrender to an agency.

§422.4. Persons authorized to surrender child for private adoption.

The father and mother indicated on the certified copy of the child's birth certificate provided in R.S. 9:422.2 must join in signing the authentic act of surrender of that child. If the father of the child is not indicated, the mother may sign the authentic act of surrender alone. Should the indicated parent or parents be under the age of eighteen at the time of signing of the act of surrender, the parents of the indicated parent or parents must also sign the act of surrender; if said parents are legally separated or divorced or one is deceased, in that case the parent with custody or the living parent must sign the act; if the surrendering parent or parents are under a guardianship, said guardian should sign the act.

§422.5. Surrender to adoptive couple or their representative

The voluntary surrender may be made only to a person or couple qualified to petition for the adoption of the child and only for the purpose of actually adopting the child; provided, however, that the prospective adoptive parent

or parents may be represented in the act of surrender as provided in this Part.

§422.6. Formal act of surrender; contents

The formal act of surrender shall identify the parents or parent of the child by name, parish of domicile, age, and marital status; shall identify the child and the parish of birth of the child; shall indicate the name and address of the person or persons to whom the surrender is made, or the name and address of the representative of that person or persons; and shall recite: (1) the date of birth of the child to be surrendered and that the act is not signed earlier than the fifth day following that date; (2) that the parent or parents freely and voluntarily surrender custody of the child for the purpose of private placement and adoption; (3) that the parent or parents consent to the adoption; (4) that the parent or parents have been informed and understand that their rights as parents of the child are to be terminated, and (5) that notice and service of any pleading of any sort in any subsequent adoption proceeding is waived. Should a surrendering parent of the child be under the age of eighteen at the time of signing, the formal act shall also recite that fact and shall state that the surrendering parent under the age of eighteen is joined in signing the formal act of surrender by those individuals indicated in R.S. 9:422.3. Each necessary party must sign in the presence of a notary and two witnesses, although it is not necessary that they sign the same instrument.

§422.7. Time at which formal act of surrender may be executed

The formal authentic act of voluntary surrender shall not be signed earlier than the fifth day following the date of the birth of the child to be surrendered. The surrendering parent or parents shall be represented by an attorney at the execution of the act of surrender.

§422.8. Effect of formal act of surrender

The formal act of voluntary surrender grants the legal custody of the child identified in the act to the person or persons named or represented in the act. Further, the formal act of voluntary surrender grants the irrevocable consent, except as specifically provided in R.S. 9:422.10, of the surrendering parent or parents to the adoption of a child by the person or persons named or represented in the act. Should there be only one parent indicated on the birth certificate referenced in R.S. 9:422.2, the surrender by that parent alone terminates all parental rights whatsoever, except as provided in R.S. 9:422.10.

§422.9. Anonymity of parents and adoptive parents protected

The formal act of voluntary surrender need not name the person or persons who are to become the adoptive parent or parents of the child surrendered. An attorney at law may be named in the act of surrender as the represent-

ative of the prospective adoptive parent or parents. Likewise, the prospective adoptive parent or parents need not be informed of the identity of the surrendering parent or parents or be shown the petition or supporting exhibits or other documents connected with the adoption proceeding.

§422.10. Opposition to adoption; revocation of consent

The parents executing the act of legal surrender, acting jointly or individually, may oppose the adoption of the child surrendered only by a clear, written declaration of the revocation, made within thirty days after executing the formal act of surrender. The writing must reasonably identify the child surrendered and the act of surrender; attaching a copy of the act of legal surrender being sufficient. A copy of the writing must be sent by certified or registered mail to the person or persons, or their representative, identified in the act of surrender to whom the custody of the child was granted to be of any effect. Proof of actual receipt of the writing must be made by an affidavit of mailing with signed return receipt attached or by other proof as in a civil trial. Should there be only one parent indicated on the birth certificate referenced in R.S. 9:422.2 and that parent alone has executed the legal act of surrender, then the nonindicated parent may oppose the adoption only by proof of the legal and formal acknowledgement or legitimation of the child by that parent prior to the entering of a decree

of adoption. The rights and procedures in this Section are exclusive.

STATEMENT OF THE CASE

Petitioner, F. D., gave birth to a child out of wedlock. One month later while under the continuing influence and counselling of Associated Catholic Charities of New Orleans, Inc. on February 24, 1984, she executed, before a Notary Public, an act of surrender, surrendering custody of her child to Associated Catholic Charities of New Orleans, Inc. (ACC), a licensed adoption agency under the laws of Louisiana.

On March 22, 1984, petitioner notified ACC by certified mail that she intended to revoke her surrender and regain custody of the child. Because the law regulating agency adoptions, La. R.S. 9:401, 9:402 and 9:404, does not provide for the revocation of consent after a surrender of a minor child to an agency, but rather irrevocably terminates all of the surrendering parent's rights, F. D. was not given back her child.

F. D. then filed a writ of habeas corpus in Orleans Parish Civil District Court. ACC and John Doe and Jane Roe as the married couple who received physical custody of the child from ACC, were named as defendants.

F. D. alleged in her petition that there was a vitiation of consent by duress and the unconstitutionality of La. R.S. 9:401, 9:402 and 9:404. Respondents filed an Exception of No Cause of Action.

The trial court, through Judge Louis Di Rosa, granted judgment in favor of ACC dismissing plaintiff's suit for failure to state a cause of action upon which relief could be granted. F. D. appealed this decision. The Court of Appeal,

Fourth Circuit, State of Louisiana, affirmed the trial court's exception of No Cause of Action and the Supreme Court of Louisiana denied writs.

REASONS FOR GRANTING THE WRIT

"A mother is a mother still, the holiest thing alive."

Coleridge

Ageless, timeless is a child's love for his mother. Such a bond created is sacrosanct, the severance of which should fall under the strictest of scrutinies.

The questions presented in this petition for writ of certiorari are ones which must, of necessity, balance countervailing interests: those of the natural mother, those of the State, and those of prospective adoptive parents.

There can be no argument that adoption procedures promulgated must insure prospective adoptive parents the maximum degree of certainty that a child, once placed with them, will not be wrenched from their arms without compelling circumstances. However, the fundamental liberty interest guaranteed by the U.S. Constitution mandates procedural and substantive safeguards for the surrendering parent, safeguards which were not afforded the petitioner herein.

I.

The State in enacting Louisiana Revised Statutes 9:401, 9:402 and 9:404 and 9:422.3-422.10 impermissibly discriminated (and violated the Equal Protection Clause of the Fourteenth Amendment) against that class of parents who contemplate surrender of their children for adoption, for the statutes governing agency adoption do not allow for any rescission of the surrender nor mandate legal counsel, whereas the statutes governing private adoption (Louisiana Revised Statutes 9:422.3-422.10) do allow for a 30-day period in

which to rescind surrender, and as well require that the surrendering parent have legal counsel present at the act of surrender.

In *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549 at 1555, 71 L.Ed. 2d 770 (1982), this Court judicially recognized the state of mind of an unwed mother at the time of birth:

> Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of paternity suit within 12 months of birth.

In *Mills*, this Court found that the State's interest in preventing stale or fraudulent paternity claims could not justify a one-year prescriptive period when the State allowed claims for support during the entire minority of a legitimate child.

In the case at bar, the State has established a different statutory procedure for the parent surrendering his or her child to an agency than for the parent surrendering to a private individual.

The State has afforded a parent who privately places his or her child for adoption with a means by which to revoke the surrender by notifying in writing, within 30 days of the surrender, the private party in whose custody the child remains. Further, the surrendering parent is required to have legal counsel present at the execution of the act of surrender, under penalty of nullity.

No such safeguards are present in the statutory procedure governing agency adoptions. Once the act of surrender is executed, it irrevocably terminates all parental rights.

The only means of invalidating such a surrender is by alleging fraud or duress, which was done in the instant case in paragraph of F. D.'s petition for habeas corpus; however, the below quoted allegations, on their face, were not found sufficient to justify a "vice of consent".

"PARAGRAPH IV.

> For the thirty-day period following the birth of her daughter, A. C. D., petitioner, F. D., was in a state of extreme distress about the prospect of giving the child up for adoption and was constantly during this thirty-day period being counseled by representatives of the defendant, Associated Catholic Charities of New Orleans, Inc. to give the child up for adoption, being told information as to how financially able to care for the child the adoptive parents were, what good parents they would be, all of which put the petitioner in a state of confusion, ambivalence and guilt over keeping the child. Finally, on February 24, 1984, petitioner executed an authentic act of "Voluntary Surrender", such execution being under extreme duress, thereby vitiating F. D.'s consent and nullifying the "voluntary surrender" act."

Herein presented is the classic case of a state law which conclusively denies to one subclass of individuals (natural parents surrendering their children to agencies) benefits which are available to another subclass (natural parents sur-

rendering their child to private parties). It is submitted that the statute governing surrender for agency adoption purposes must fall as unconstitutionally depriving petitioner of equal protection under the law. *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed. 2d 363 (1974); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1972); *Handley, By and Through Herron v. Schweiker*, 697 F.2d 999 (1983).

It must be held that the surrender scheme places such an insurmountable barrier upon the petitioner as to unconstitutionally deprive her of her equal protection rights. For the test here, due to the fact that there is at stake a fundamental liberty interest, is one of strictest scrutiny.

The strict scrutiny test has been used when determining issues involving religion, race, national origin and fundamental rights. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973).

This Court in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972), *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972), *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 2d 1042 (1923), *Quilloin v. Wilcott*, 98 S.Ct. 549 (1978) and in myriad other decisions has held that an individual is guaranteed the freedom of personal choice in family matters, and in particular, the custody, care and nurture of one's child. Therefore, the state of Louisiana must show a compelling state interest for the statute to withstand strict scrutiny. And the state not only has not done so, but cannot do so. For unless and until there is some allegation of unfitness of a parent, the State as *parens patriae* must favor preservation, not severance of natural familial bonds. *Santosky v. Kramer*, 102 S.Ct. 1388 (1982).

Even if this Honorable Court were to find that the different treatment and classification of parents surrendering children for adoption was not subject to strict scrutiny, the "substantial relationship" test in the alternative should apply. *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed. 2d 297 (1979); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971).

Even still, the state cannot justify the disparity in treatment because the classification bears no fair and substantial relationship to the object of the legislation. Obviously, agencies don't need protection; natural parents contemplating surrender of their children (especially unwed mothers immediately after the birth of their children) do.

For these reasons, the Louisiana Statutes governing surrender of children to adoption agencies must be invalidated on equal protection principles.

II.

Louisiana Revised Statutes 9:401, 9:402 and 9:404 (pertaining to agency adoption proceedings) in not providing a parent any period of time in which to rescind the surrender of his or her child to an adoption agency, and in terminating at the time of the surrender all rights of the parent to appear and object to any adoption proceedings or to appear at any other proceedings involving the welfare and placement of the child, or to even be notified of said proceedings, deny the petitioner due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and by the Constitution of the State of Louisiana.

The requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it is the very essence of due process. *Mathews v. Eldridge*, 96 S.Ct. 893 (1976).

The beauty of the due process guarantee is that it is flexible enough to encompass a variety of circumstances and to mandate the creation of a panoply of safeguards to protect an individual's liberty and property interests.

This Court has on numerous occasions recognized the liberty interests of parents in the care and custody of their child. *Santosky v. Kramer*, 102 S.Ct. 1388 (1982). It may be argued that a forced taking of a child by the State is distinguishable from the case herein where an unwed mother "voluntarily" executed an act of surrender.

However, it is submitted that an irrevocable act of surrender on a pre-printed form, executed in front of a notary employed by the adoption agency, afforded no meaningful opportunity to the petitioner to understand the full consequences of her actions. These facts, coupled with judicial recognition of the state of mind of an unwed mother following the birth of her child, seriously call into question whether such a surrender and the concomitant waiver of all rights to the custody of the child was knowingly, voluntarily and intelligently executed.

In *Rivera v. Marcus*, 696 F.2d 1016 (1982), the Second Circuit U.S. Court of Appeals addressed the same issue at bar. Ms. Rivera was found in that case to be deprived of her due process rights when she was not provided with timely and adequate notice of reasons for the termination of a foster care agreement nor an opportunity to confront and cross-examine witnesses.

Ms. Rivera had voluntarily executed a foster care agreement with the state welfare department which agreement authorized the state to remove the children from her foster home at any time, without a prior hearing. In the instant case, F. D. executed a surrender which effectively emasculated all of her parental rights without a hearing, but should have been afforded one.

In *Mathews v. Eldridge*, 96 S.Ct. 893 (1976), this Court has held that:

> Identification of specific dictates of due process generally requires consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Clearly, in the case at bar the factors enunciated above in *Mathews* can be readily ascertained: the substitute procedural safeguards are already in place and operating pursuant to La. R.S. 9:422.3 - 9:422.10, the statutes governing parental surrender to private parties.

In a country where liberty and property interests have been zealously protected by the due process clause in such diverse instances as proceedings involving termination of social security benefits, *Mathews v. Eldridge*, 96 S.Ct. 893 (1976), defense of paternity litigation where the indigent father was afforded blood grouping tests at the State's expense, *Little v. Streater*, 101 S.Ct. 2202 (1981), the taking of property

burdened with a mortgage wherein the debtor had executed a waiver of all notice requirements, *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), it seems inconceivable that we would not accord to a mother some procedural safeguards when she is confronted with the most difficult of decisions: the surrendering of her flesh and blood to another party.

While *Stanley v. Illinois*, 92 S.Ct. 1208 (1972), stands for the legal proposition that a hearing is not required in every case where the State seeks to impair a private interest, it also holds that:

> The Constitution recognized higher values than speed and efficiency; the Bill of Rights in general, and the due process clause in particular, were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

We live in a society where Congress promulgates legislation protecting consumers to such an extent that they have a three-day cooling-off period within which to cancel certain transactions. 15 U.S.C. 1635.

Can this Court turn its back on an admittedly vulnerable class of persons, unwed mothers contemplating surrender to an agency, and not afford them some measure of time in which to reflect upon the wisdom of their decision, some semblance of due process in order to effect a change of heart? In the safeguarding of our most fundamental of liberty interests, this Court must not.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeal, Fourth Circuit, State of Louisiana.

Respectfully submitted:

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition of Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

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PAULA PERRONE

DATED: May 7, 1986

APPENDIX

APPENDIX

THE SUPREME COURT OF THE STATE OF LOUISIANA

F. D.

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC.,
JOHN DOE AND JANE DOE

No. 86-C-0074

Re: F. D., applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, No. 3536-CA; Parish of Orleans Civil District Court Div. "D" No. 84-10738.

February 7, 1986

Denied.

FAB
JAD
PFC
WFM
JLD
JCW
HTL

Court of Appeal
Fourth Circuit
Filed February 10, 1986
/s/ Danielle Schott
Clerk of Court

Supreme Court of Louisiana
February 7, 1986

/s/ Frans J. LaBranche, Jr.
Clerk of Court
For the Court

A-2

RECORD

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

F. D.

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC.,
JOHN DOE AND JANE DOE

NO. CA-3536

AN APPEAL FROM THE
CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 84-10738
HONORABLE LOUIS DiROSA
JUDGE

JAMES C. GULOTTA
JUDGE

GARRISON, J., DISSENTS WITH WRITTEN REASONS

(Court composed of Chief Judge William V. Redmann, Judges James C. Gulotta and Jim Garrison)

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December 11, 1985

AFFIRMED

Plaintiff, an unwed mother who surrendered her natural child to a licensed adoption agency, appeals from a dismissal, on an exception of no cause of action, of her habeas corpus petition to regain permanent custody of the child.[1] We affirm.

On February 24, 1984, plaintiff signed a notarial act surrendering her one-month old dauthter to Associated Catholic Charities of New Orleans, Inc., a state-licensed adoption agency. On March 22, 1984, however, she informed A.C.C. by certified mail that she desired to revoke her consent. Upon defendant's refusal to return the child, plaintiff filed a petition for writ of habeas corpus.

Plaintiff seeks to annul her act of "voluntary surrender" for lack of consent and, further, to have the surrender of children to licensed adoption agencies (R.S. 9:401 - 9:407)

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1. To preserve the privacy of the individuals involved, we have deleted all references to personal identities in this opinion.

declared unconstitutional as violative of her rights of due process and equal protection of the laws. The gist of plaintiff's constitutional attack is that the statutory scheme for agency adoptions, unlike the statutes authorizing private adoptions (LSA-R.S. 9:422 et seq.), provides no time period for a parent to revoke her act of surrender and makes no provision for representation of the natural parent by legal counsel at the time of execution of the authentic act of surrender.

A natural parent's act of surrender of a child under LSA-R.S. 9:402 must be free of any fraud or vice of consent. *Ball v. Campbell*, 219 La. 1076, 55 So. 2d 250 (1951); *Golz V. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976); *Allen v. Volunteers of America*, 378 So. 2d 1030 (La. App. 2nd Cir. 1979), writ denied 381 So. 2d 509 (La. 1908). Where the natural parent sufficiently alleges that she has surrendered her child under such pressure and coercion, she states a cause of action entitling her to offer evidence in support of those allegations. *Ball v. Campbell*, supra. Nonetheless, an unwed mother's vacillation in deciding whether or not to surrender her child, though indicative of her torment and heightened emotions about her dilemma, does not necessarily prove that her consent to the surrender was legally viatited. See *Allen v. Volunteers of America*, supra.

In the instant case, the supplemental and amending petition alleges, in pertinent part:

> "For the thirty-day period following the birth of her daughter . . . petitioner . . . was in a state of extreme distress about the prospect of giving the child up for adoption and was constantly during this thirty-day period being counseled by representatives of the defendant, Associated Catholic Charities of New Orleans, Inc. to give the child up for adoption, being

> told information as to how financially able to care for the child the adoptive parents were, what good parents they would be, all of which put the petitioner in a state of confusion, ambivalence guilt [sic] over keeping the child. Finally, on February 24, 1984, petitioner executed an authentic act of 'Voluntary Surrender', such execution being under extreme duress, thereby vitiating . . . consent and nullifying the 'voluntary surrender' act."

Considering these allegations, we conclude that plaintiff has failed to state a cause of action entitling her to annul the act of surrender for a vice of consent. Plaintiff factually alleges only that the adoption agency's representatives counseled her over a thirty-day period to give the child up for adoption by informing her that the adoptive parents would be good persons and financially able to care for the child. Although the mother further alleges that she was in a state of "extreme distress" and that counseling confused her and made her feel ambivalent and guilty, such vacillation and torment over her decision do not constitute a vice of consent. See *Allen v. Volunteers of America*, supra. Furthermore, plaintiff's remaining conclusory allegation that her execution of the authentic act of surrender was under "extreme duress" vitiating and nullifying her consent is unsupported by factual allegations. Accordingly, we conclude the trial judge properly maintained the exception.

We further reject plaintiff's constitutional attack. In *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So. 2d 865 (La. 1976), the Louisiana Supreme Court held that the statutory procedure for agency adoptions does not violate due process of law by failing to afford a natural parent legal counsel or a judicial hearing before the surrender of parental rights in a formal instrument.

Plaintiff raises equal protection arguments in the instant case. Because we conclude a rational basis exists for the Legislature to treat the requirements for an agency adoption and a private adoption differently, we conclude no constitutional impairment exists based on lack of equal protection. Private adoptions are not clothed with safeguards that exist in a state licensed and regulated agency, and one can reasonably conclude that greater abuse might occur in a private adoption setting than in an agency one. Therefore, more strigent requirements, as determined by the Legislature in private adoptions, clearly have a rational basis.

Because these differences in procedure between private and agency adoptions are founded on real distinctions and are not arbitrary or irrational, we conclude they further a legitimate state purpose. LSA-Const. Art. 1 §3; *R. J. D'Hemecourt Petroleum v. McNamara*, 444 So. 2d 600 (La. 1984), certiorari denied _____ U.S. _____ , 105 S.Ct. 92, 83 L.Ed. 2d 39 (1984); *Harry's Hardware Inc. v. Parsons*, 410 So. 2d 735 (La. 1982), certiorari denied 459 U.S. 881, 102 S.Ct. 178, 74 L.Ed. 2d 145 (1984). Furthermore, a mother is free to choose whether she decides to surrender or not surrender the child and whether she prefers an agency or private adoption if indeed she wants to surrender the child.

For these reasons, we conclude R.S. 9:401 - 9:407 are not violative of the equal protection guarantees provided for in the United States and Louisiana constitutions.[1]

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1. U.S.C.A. Const. Amend. 14; LSA-Const. Art. 1, §3.

Accordingly, the judgment is affirmed.

AFFIRMED

A TRUE COPY
New Orleans, February 10, 1986
/s/ S. McCausland, Dy.
Court of Appeal, Fourth

REHEARING NOT APPLIED FOR

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

F. D.
versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC.,
JOHN DOE AND JANE DOE

NO. CA-3536

GARRISON, J., DISSENTS:

Plaintiff, an unwed mother, executed an act of "voluntary surrender" of her child (approximately 4 weeks after its birth) to Associated Catholic Charities of New Orleans, Inc. A month later she informed the Association that she intended to revoke her consent and regain the child's custody. The trial court has held that she cannot do so. The majority of this panel affirms that judgment. I disagree.

In the full context of the circumstances, it is apparent that consent – in the sense of being a free and deliberate exercise of will – was lacking when plaintiff surrendered her child. See Article 1819 of the Civil Code regarding facts vitiating consent.

In determining if there existed vice in the consent the age, sex, health, temper, disposition of the party and other circumstances must be taken into consideration. Article 1851.

Under the circumstances of her surrender of her child a mere 4 weeks after its birth, it is inconceivable that this young unmarried mother was not overwhelmed by anxiety,

guilt and concern for the child's support. Consequently, I find the requirement of consent in the transaction to be absolutely lacking. Furthermore, in my judgment, the complete absence of a time period in which to revoke her consent and of the provision of legal counsel for her represent an application of a law which is inhumane to the point of being primitive.

Consequently, in addition to the clear absence of consent as a factual matter, it appears to me that Revised Statutes 9:401-407 – to the extent to which they apply to this case – are manifestly unconstitutional as violations of plaintiff's right to due process. They are unconstitutional because they deny to a woman in the plaintiff's circumstances the right to revocation and the right to counsel on the ground that an adoption agency is involved, whereas in a private non-agency adoption there would be available to her such safeguards. Revised Statutes 9:422.7 and 9:422.10.

No. 85-1844

(2)

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

F. D.,

Petitioner,

versus

ASSOCIATED CATHOLIC CHARITIES
OF NEW ORLEANS, INC. AND
JOHN DOE AND JANE ROE,

Respondent.

Response to Petition For
A Writ of Certiorari
To The Court of Appeal,
Fourth Circuit, State of Louisiana
And Motion To Vacate The Judgment Below

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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No. 85-1844

IN THE
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OCTOBER TERM, 1985

F. D.,

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versus

ASSOCIATED CATHOLIC CHARITIES
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Response to Petition For
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Fourth Circuit, State of Louisiana
And Motion To Vacate The Judgment Below

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, F. D., gave birth to a child out of wedlock. One month later, on February 24, 1984, availing herself of the provisions of La. R.S. 9:401, 402 and 9:404, she executed an authentic act of voluntary surrender, irrevocably surrendering legal custody of her child to respondent Associated Catholic Charities of New Orleans, Inc. (hereinafter referred to as "ACC") for purposes of adoption. ACC is an adoption agency, licensed under the laws of Louisiana.

On March 22, 1984, petitioner informed ACC that she wished to regain custody of the child. Because the law regulating agency adoption specifically states that the voluntary surrender of a minor child to an agency for adoption is irrevocable, ACC could not and did not comply with petitioner's request.

Petitioner then filed a writ of habeas corpus in Orleans Parish Civil District Court. ACC and John Doe and Jane Roe, as the married couple who adopted the child in August 1984 were named as defendants. (The child was placed in their home on February 27, 1984.)

Petitioner alleged as the sole basis of her petition that because La.R.S. 9:422.10 contained a provision for the revocation of consent, she was entitled to the return of her child. Petitioner initially failed to realize that La.R.S. 9: 422.10 falls under the section of the law regulating the surrender of a child for a private adoption. Ironically, petitioner now acknowledges the distinction but claims that it is unconstitutional.

Petitioner not only amended her petition to declare the Louisiana Adoption statutes unconstitutional, but also alleged vitiation of consent by duress because she had been given information as to how financially able to care for the child the adoptive parents were and what good parents they would be, which she claims put her in a state of confusion. ACC filed an Exception of No Cause of Action.

The trial court granted judgment in favor of ACC, dismissing petitioner's suit for failure to state a cause of action upon which relief could be granted.

The Court of Appeal Fourth Circuit, State of Louisiana, affirmed the lower court and the Louisiana Supreme Court denied petitioner's writ of certiorari.

REASONS FOR DENYING PETITIONER'S WRIT APPLICATION

The petitioner should be more candid: she has had a change of heart and now seeks to undo her decision to surrender her minor child for adoption. Perhaps motivated by the guilt of that decision, petitioner would have this Honorable Court upset the entire Louisiana adoption scheme. Would her guilt be lessened knowing that a decision by this Court in her favor would take her daughter away from the only parents that the child has ever known?

The petitioner's application for review by this Honorable Court should be denied. It should be denied because the arguments advanced by the petitioner are completely devoid of legal support. Her discussion of the putative issues thus becomes an exercise in dissembling, wherein case holdings of this Honorable Court are distorted and misapplied. Petitioner further fails to recognize Louisiana's interest in supporting its present statutory scheme for adoption.

But another compelling reason for denial of review resides in the precedent of *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So.2d 865 (La. 1976), appeal dismissed 426 U.S. 901, 96 S.Ct. 2220, 48 L.Ed.2d 827 (1976), a case challenging the same laws under attack here; involving similar issues raised by this petitioner; and presenting a similar factual backdrop. Since this Honorable Court denied review in *Golz*, supra, the force and logic of *stare decisis* should obtain in the instant case as well.

I.

The Louisiana adoption statutes which regulate the surrender of a minor to a licensed adoption agency do not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The petitioner prefaced her argument with a line from Coleridge. She may as well have quoted from "The Rhyme of the Ancient Mariner," for her premise is entirely off-base: ironically for her, it is the love of the adoptive parents for their daughter that is most threatened here. A more appropriate quotation, which better serves as the touchstone for consideration of the petitioner's argument, can be found in Charles Krauthammer's column in the "New York Daily News" of July 2, 1986. It has special meaning in this case, for it summarizes accurately the entire tenor of petitioner's complaints:

> "There is no greater intellectual laziness than the proposition that perception is reality. The last place that Orwellian slogan ought to find refuge is in the law. The whole point of the law is to determine which perceptions are real and which aren't, and to give legal standing to one and not the other."

Petitioner has accused Louisiana's adoption scheme of "impermissibly discriminating against that class of parents who contemplate surrender of their children for adoption." The basis of this complaint resides in the facts that a surrender to a state-licensed agency is irrevocable and that there is no requirement for legal counsel at the surrender, while a surrender to a private party allows for a thirty (30) day rescission period as well as requires that the surrendering parent(s) be represented by counsel at the execution of the

act of surrender. A plain reading of the statutes under attack shows that no "impermissible discrimination" at all results from Louisiana's adoption law.

At this point, we should define with precision any "categories" or "classifications" which may come into being via the adoption statutes. It is important to note that it is the surrendering parent, and not the law, which defines the "category" into which the parent will fall in the adoption process.

The Louisiana Legislature has made it possible for a birth parent to freely choose whether or not to surrender a child for adoption to a licensed agency or to a private individual. Thus the application of the laws peculiar to each procedure is the result of the birth parent's volition in every case. Of course, the birth parent may choose not to surrender at all. Thus, as a threshold matter, the State of Louisiana in no sense "discriminated against that class of parents who contemplate surrender of their children for adoption," (to use petitioner's own phrasing).

In making an equal protection challenge, it is the claimant's burden to "demonstrate in the first instance a discrimination against (her) of some substance." *American Party of Texas v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applicant has failed completely to carry that burden.

Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution. *Clements v. Fashing*, 457 U.S. 957, 967, 102 S.Ct. 2836, 2845, 73 L.Ed.2d 508 (1982) (citing *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 57 S.Ct. 461, 465, 99 L.Ed. 563 (1955).) The Equal Protection Clause allows

the states considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Clements*, supra, 457 U.S., at 962-963, 102 S.Ct., at 2843.

It is beyond dispute that there exists a rational, and very important, relation between the Louisiana adoption statutes and the legislative objective in passing them. One commentator, Walter J. Wadlington, Jr., writing in the Tulane Law Review, discussed the distinctions between agency and private adoptions: (36 Tul.L.Rev. 201, 210)

> "The two methods for adoption of children in Louisiana today are: (1) the agency adoption, which includes those in which placement is made by either a licensed adoption agency or the Department of Welfare and (2) the private adoption, which results in placement through any other means. The latter category is generally subdivided by distinguishing between 'related' adoptions in which the adoptor is a natural parent, or step-parent or close relative of the adoptive child, and the so-called 'independent' adoptions in which adoptor and adopted have no prior relationship, either by consanguinity or affinity. *This method of categorization, which is based chiefly on initial placement of the child with the prospective adoptor, is recognized by the establishment of separate procedural require-*

> *ments for accomplishing the adoption.*" (Emphasis added.)

Such alternative procedures make sense. As Wadlington notes, the private adoption is better-suited to the "related" adoption, in which a step-parent or other blood relative seeks to adopt a child. It would not be desirable or sensible to employ the surrender of the child to an agency in such a case. On the other hand, in the "independent" adoption, in which the adopted has no relationship with the adoptor, the agency procedure contains distinct and worthy advantages to all parties involved: the child to be surrendered, the adoptive parents and the birth parent. Wadlington discusses a few of these benefits: (36 Tul.L.Rev. 201,212)

> "The four principal advantages of the agency adoption are: (1) when a child is placed, he is clearly available for adoption, the irrevocable consent of the parents or decree of abandonment having previously been obtained; (2) only one hearing is necessary before a final adoption decree can be rendered, two are required for an independent (private adoption); (3) the agency, through its investigative resources, can carefully and scientifically seek to match an adoptor and adopted compatibly; (4) both the adoptor and adopted are insulated from contact with the knowledge of the original parents."

In fact, petitioner has overlooked some of the benefits she enjoyed from surrendering her child to respondent ACC, one full month after the baby's birth (not "immediately" thereafter, as F. D. distorts in her application). Petitioner benefited from the fact that:

(1) ACC is a reputable organization with a long history of competence and integrity upon which she could rely with confidence;

2) ACC is a licensed adoption agency, thus subject to state supervision and regulation;

3) ACC is required to staff qualified personnel, experienced in the field of adoption practices, counseling and social welfare;

4) ACC has access to a network of adoption resources, both within and outside of Louisiana, that complement their own;

5) these resources would be used to investigate fully the background and present circumstances of any prospective adoptive couple;

6) ACC makes every effort to find parents who are a suitable genetic and biological match for the adopted child;

7) ACC would make certain that the adoptive couple would be financially able to care for the child;

8) ACC is a non-profit agency, thus money is never a motive for arranging adoptions.

In the private "independent" adoption setting, the surrendering parents enjoy none of the above advantages.

Tendentiously, the applicant has incorrectly relied on *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), in support of her insubstantial claim that no "substantial relationship" exists between Louisiana's adoption

laws and the legislative purpose in enacting them. This Honorable Court will recognize that *Caban*, supra, renders no support at all to the applicant's argument. *Caban*, supra, concerned a gender-based classification inherent in New York's adoption legislation, whereby a natural mother could block the adoption of her child simply by withholding her consent, while the natural father was denied any such veto power. This Honorable Court ruled that such a gender-based classification bore no substantial relation to any legitimate state interest. The applicant's present attempt to equate New York's sex-based distinction with Louisiana's parallel adoption procedures is feeble and must be dismissed.

The cases upon which the petitioner relies as erstwhile support for her untenable position are, simply, not appropriate. For example, *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974) involved the eligibility of different classes of illegitimate children for Social Security benefits. This Honorable Court held that a discriminatory law that deprived such benefits on the status of birth violated equal protection because such classification bore no legitimate state interest. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), struck down the Louisiana Workers' Compensation law that denied recovery rights to unacknowledged illegitimates, who were relegated to lesser status in the priority list vis-a-vis other illegitimates. This discriminatory treatment was violative of equal protection for lack of a significant relationship to the recognized purpose of the workmen's compensation laws. Similarly, *Handley, By and Through Herron v. Schweiker*, 697 F.2d 999 (11th Cir. 1983), concerned an Alabama intestacy scheme which denied illegitimate children benefits under the Social Security Act. All of these cases dealt with denials of benefits to illegitimates solely on the basis of the birth status of the deprived children. These are not legitimate authority for the equal protection issue raised in the case *sub judice*.

A more egregious example of misapplication of the law resides in the petitioner's extract from *Mills v. Habluetzel*, 456 U.S. 91, 102 S.Ct. 1549, at 1555, 71 L.Ed.2d 770 (1982), quoted at page 13 of F.D.'s petition, which she describes as this Honorable Court's "judicial recognition of the state of mind of an unwed mother at the time of birth." In fact, that quotation lifted by the petitioner refers to obstacles which unwed mothers faced in bringing paternity suits within the one-year prescriptive period imposed on such claims by a Texas statute. Such a fast-and-loose manipulation of the holdings of this Honorable Court is further illustration of the guiding theme of the petitioner's application: an attempt to turn her perception of the law into a false reality, as by some form of legal alchemy. This Honorable Court is reminded of petitioner's feeble claim of vice of consent in the signing of the authentic act of surrender based on the fact that she had been told that the adoptive parents would provide a good home for her child. The Louisiana district court, the appellate court and the state supreme court rejected that claim.

It is not incomprehensible to assume, using petitioner's logic, that if she had surrendered to a private individual, she would have objected to not having had counseling by licensed social workers and that the thirty (30) day period in which to revoke consent was either too much time or too little.

Another example of petitioner's illogic is the fact that she complains that the presence of counsel is not mandated in a surrender to an agency, yet she never articulates why a lawyer is needed; indeed, no holding of this Honorable Court, or any other court, has imposed such a requirement. See *Golz*, supra. The mere presence of counsel at a surrender is not the solution for all perceived ills. Unless the attorney is experienced in adoption law, and unless he does not stand to profit from the situation, there is no assurance that the proceeding will be handled competently. An example of a Louisiana case in which an attorney, evidently not conversant with adoption

law, mishandled a private "independent" adoption with disastrous results for the adoptive family is *Wuertz v. Craig*, 458 So.2d 1311 (La. 1984). The Louisiana agency adoption procedure, conducted by experts with experience in the field, who are not driven by a profit motive, is the infinitely safer, more reliable mode of surrender.

II.

The Louisiana statutes which regulate the surrender of a minor to a licensed adoption agency do not violate the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

The petitioner's process of dissimulation continues with the second question she raises in her application. There is a great deal of illogic and overlap in her arguments. This claim of petitioner can be summed up as follows: Louisiana's adoption scheme violates due process because the surrender to a state-licensed agency does not allow for a time period within which the surrendering parent can rescind the surrender and does not allow a birth parent to be notified of the adoption proceedings. (Petitioner raises the latter claim for the first time in her application.)

A compelling reason for this Honorable Court to deny F.D.'s petition is the disposition of *Golz*, supra, a Louisiana case quite similar to the present case. In that case, a married couple approached Children's Bureau, a state-licensed agency, and inquired about giving up their yet-unborn child for adoption. Told that the surrender would have to wait until after the baby was born, the couple waited until their son was delivered. Subsequent to the birth, the parents initiated contact with the agency on several different occasions in order to surrender their son. Each time, however, they vascillated and returned home without effecting the surrender.

Finally, six months after the child's birth, the boy was surrendered to Children's Bureau. But the day after that event, the couple told the agency that they had changed their minds and wanted their son back. Children's Bureau refused to return the child and the parents filed suit, alleging as does the instant petitioner, there was no valid consent to the surrender, that under the adoption statutes the birth parents could revoke their consent and that the statutory adoption procedure of La.R.S. 9:402 et. seq. unconstitutionally deprived the parents and child of the due process of law. The court in *Golz*, supra, found that the birth parent's consent was freely given and that under La.R.S. 9:402 the surrender of a minor child to an agency for adoption is irrevocable.

Of particular importance in the holding in *Golz*, supra is that the court, in recognizing that Louisiana is not alone in providing for the irrevocability of an act of surrender to a licensed adoption agency, stated:

> "Louisiana is not alone in providing for the irrevocability of an act of surrender to a licensed adoption agency. New Mexico, Nevada, Mississippi, Indiana, Illinois, Ohio, New Jersey, and the District of Columbia are among the jurisdictions which provide that such a surrender by a natural parent is irrevocable, in the absence of fraud or duress. See New Mexico Statutes Ann. ss 22-2-27 (Supp. 1975); Nev.Rev.Statutes ss 127.080; Miss. Code of 1972 Ann. ss 93-17-9; Ohio Revised Code Ann. ss 3107.06(B)(2); Dist. of Columbia ss 16-304 and ss 32-786; N.J. Statutes 9:2-16; *Acedo v. Arizona Dept. of Public Welfare*, 20 Ariz.App. 467, 513 P.2d 1350 (1973); *Catholic Charities of the Diocese of Galveston, Inc. v. Harper*, 161 Tex.21, 337 S.W.2d 111

(1960); *Gonzales v. Toma*, 330 Mich. 35, 46 N.W.2d 453 (1951); *Kozak v. Lutheran Children's Aid Society*, 164 Ohio 335, 130 N.E.2d 796 (1955); *Adoption of Doe*, 87 N.M. 253, 531 P.2d 1226 (1975)." (*Golz*, 326 So.2d at 870.)

On the constitutional issue, the court in *Golz*, supra, held that once the rights of a parent have been surrendered to an agency, the parents no longer have an interest to be protected in the adoption proceeding, and therefore, the proper party to receive notice of adoption proceedings is the agency. The Louisiana Supreme Court rejected that constitutional challenge and the couple sought relief in this Honorable Court. Review was denied with a succinct evaluation that aptly describes the present petition: "The appeal is dismissed for want of a substantial federal question." *Golz*, supra, is a forceful precedent.

It should come as no surprise that the authorities cited by the petitioner have no application to this case. The petitioner cites *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), in which the children of an unwed father were taken from him in a dependency proceeding instituted by the state of Illinois with no determination that he was in any way an unfit parent. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the convictions of Amish parents who violated the state's compulsory school-attendance law were reversed. This Honorable Court, in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed.2d 1042 (1923), reversed the conviction of a teacher for teaching German and thus violating a state law prohibiting the teaching of foreign languages to young children.

F.D. also cites *Quilloin v. Wilcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), in which the natural father of

an illegitimate child could not block the adoption by the child's stepfather, where the father had not petitioned for legitimation at any time in the 11-year period between the birth and the filing of the adoption petition. To paraphrase language from the late Justice Stewart's dissent in *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977): To equate the complaint of this petitioner with the fundamental interests at stake in the cases she has cited is to extend the limited substantive contours of the Due Process Clause beyond recognition. It is obvious that the petitioner's desire to abrogate her surrender to ACC cannot be considered a right that is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

More accurate authority is found in *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). This Honorable Court observed, in language that frames perfectly in context the instant petitioner's complaint:

> "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the state attempts to impose its will by force of law; the state's power to encourage actions deemed to be in the public interest is necessarily far broader." (43 U.S. at 475, 476, 53 L.Ed.2d at 495, 496.)

Louisiana's adoption scheme does not place any restriction on a constitutionally protected liberty interest. To the contrary, the encouragement of adoptions, especially agency adoptions, is consonant with legislative policy. We must now address the question whether Louisiana's agency adoption

procedure can be sustained under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right. This requires that the distinctions drawn between private and agency adoptions be "rationally related" to a "constitutionally permissible" purpose. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976).

Once more, guidance is provided by this Honorable Court. Mr. Justice Stevens, writing in *Caban*, supra, albeit dicta, describes perfectly the guiding standards behind Louisiana's agency adoption process: (441 U.S., at 407-408, 99 S.Ct. at 1776)

> ". . . it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible. Put most simply, it permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed."

As Mr. Justice Stevens observes at footnote 15, attending the above extract: "These are not idle interests." If prospective adoptive parents knew that they faced the possibility of having the birth parent abrogate her surrender, which would only lead to a totally unnecessary hearing to determine the best interests of the child, as well as protracted litigation, such couples would hesitate to adopt through licensed agencies and the significant interests fostered by this process would suffer.

Contrary to the misapprehension held by petitioner, private adoptions, especially "independent" adoptions, are fraught with hidden dangers. A surrendering parent can never be assured that any type of investigation regarding the prospective adoptors can be conducted. Hence, she could never feel confident about her child's eventual destination. The birth parent would not have had the benefit of counseling by the agency's adoption experts, who operate without a profit motive. This Honorable Court took "judicial recognition" (to borrow the petitioner's term) of the booming trade of selling babies to long-waiting couples: "Some of the ugliest disclosures of our time involve black marketing of children for adoption." *Caban*, supra.

Petitioner justifies her argument by comparing the instant situation with that which prompted Congress to enact 15 U.S.C. ss 1635, which permits the buyer in certain transactions a three-day grace period after sale within which to abrogate the contract. This analogy is superficial and incomplete. The petitioner avoids the essential question: does the Constitution mandate that such a three-day rescissory period be imposed? The answer is no. Congress saw fit to enact that legislation in order to protect the unsuspecting consumer from being mulcted by sharp practitioners. This comparison is not appropriate for this case.

A more realistic analogy is as follows: imagine that Congress instituted a consumer education program, in which prospective buyers of certain products were apprised of the ways a particular item would suit their needs. This optional program would be conducted by disinterested experts who would not profit by any sale. However, if the consumer bought a product after taking the course, the sale would be final. In contrast, if the consumer did not opt to take advantage of the course and purchased a product "sight unseen," such a buyer would have access to the rescissory term after sale.

Of course, the former situation corresponds to Louisiana's agency adoption scheme, while the latter scenario, over which *caveat emptor* hovers, describes the private adoption procedure. The safeguards inherent in our hypothetical of the counseled consumer make the rescissory term unnecessary, just as the built-in protections for all concerned in an agency adoption obviate the need for a period in which to abrogate consent.

CONCLUSION

The petitioner should be more candid. She has had a change of heart and now seeks to undo her decision to surrender. However, since the lower courts determined that there was no vice in her consent, the only way she can succeed in her rescissory effort is to attack the adoption statutes.

The Louisiana Fourth Circuit Court of Appeal, in setting forth succinctly the reason why petitioner's constitutional attack should be rejected stated:

> "We further reject plaintiff's constitutional attack. In *Golz v. Children's Bureau of New Orleans, Inc.*, 326 So.2d 865 (La. 1976), the Louisiana Supreme Court held that the statutory procedure for agency adoptions does not violate due process of law by failing to afford a natural parent legal counsel or a judicial hearing before the surrender of parental rights in a formal instrument.
>
> Plaintiff raises equal protection arguments in the instant case. Because we conclude a rational basis exists for the Legislature to treat the requirements for an agency adoption

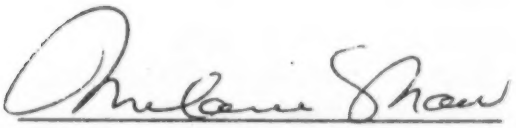
and a private adoption differently, we conclude no constitutional impairment exists based on lack of equal protection. Private adoptions are not clothed with safeguards that exist in a state licensed and regulated agency, and one can reasonably conclude that greater abuse might occur in a private adoption setting than in an agency one. Therefore, more stringent requirements, as determined by the Legislature in private adoptions, clearly have a rational basis.

Because these differences in procedure between private and agency adoptions are founded on real distinctions and are not arbitrary or irrational, we conclude they further a legitimate state purpose. LSA-Const. Art. 1 xx3: *R.J. D'Hemecourt Petroleum v. McNamara*, 444 So.2d 600 (La. 1984), certiorari denied _____ U.S. _____ , 105 S.Ct. 92, 83 L.Ed.2d 39 (1984); *Harry's Hardware, Inc. v. Parsons*, 410 So.2d 735 (La. 1982), certiorari denied 459 U.S. 881, 102 S.Ct. 178, 74 L.Ed.2d 145 (1984). Furthermore, a mother is free to choose whether she decides to surrender or not surrender the child and whether she prefers an agency or private adoption if indeed she wants to surrender the child." (Petitioner's application A-5 and A-6.)

For the foregoing reasons, a writ of certiorari should not be issued to review the above quoted judgment of the Court of Appeal, Fourth Circuit, State of Louisiana.

Respectfully submitted:

MELANIE SHAW

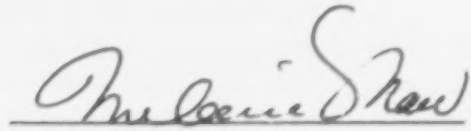


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CERTIFICATE OF SERVICE

Undersigned counsel for Respondent certifies that service of this Response To Petition For Writ of Certiorari has been made upon counsel for petitioner this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

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DATED: July 28, 1986